SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1595

RALPH LUBOW,

Petitioner,

v.

MORTON HOLLANDER, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

JOINT MEMORANDUM OF THE RESPONDENTS IN OPPOSITION

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This petition for writ of certiorari seeks review of the judgment of the Court of Appeals of Maryland in the case of *Hollander v. Lubow,* 277 Md. 47, 351 A.2d 421 (1976) (Lubow Petition, Appendix la-14a, hereafter Pet. Appx). This petition should be denied because (1) no federal question was ever raised at any stage of the proceedings below and (2) because the federal questions now raised are insubstantial.

This case arose out of the related case of *Merchants Mortgage Co. v. Lubow,* 272 Md. 305, 322 A.2d 544

(1972), which is still pending in the Maryland state courts and in which it is alleged, *inter alia*, that the petitioner Lubow (Lubow) breached a duty of loyalty to Merchants Mortgage Company (Merchants) while in its employ by diverting business opportunities to Traders Mortgage Company (Traders), a Maryland partnership in which he held a partnership interest. The respondent Rodowsky is a lawyer representing Merchants in that litigation and the respondents Hollander and Hoffberger are officers of and principals in Merchants.

In the initial stage of the *Merchants Mortgage* litigation, investigation by Rodowsky suggested that Lubow held a partnership interest in Traders but this was not specifically confirmed. Since public records indicated that Traders had assigned certain mortgages to Maryland National Bank (Bank), Hoffberger, at Rodowsky's request, contacted Charles Haynsworth in June of 1969. Haynsworth was in charge of the Mortgage Department of the Bank and he confirmed that Lubow was a partner in Traders (Pet. Appx. 5a).

As observed by the Court of Appeals of Maryland, the record does not disclose whether Haynsworth's knowledge was derived from "Maryland National's records, from a lunch table conversation in no way connected with the bank, or from any number of possible sources" (Pet. Appx. 6a). The Hoffberger inquiry to the bank and the Haynsworth response was "solely limited" (Pet. Appx. 5a) to the determination of a partnership interest.

Three and one half years later, Lubow filed this suit for alleged invasion of privacy even though the Maryland statute of limitations for tort actions is three years. The Court of Appeals of Maryland perceived "[a] number of interesting questions . . . raised by this appeal, not the least of which is whether the claims [are] barred by limitations" (Pet. Appx. 4a) but found it

unnecessary to decide that question and held that Lubow's partnership "[could] hardly be [considered] a private fact" (Pet. Appx. 13a) upon which a cause of action for invasion of privacy could be bottomed.

Lubow now petitions for a writ of certiorari, alleging a violation of his federal constitutional and statutory rights (Lubow Petition 20, hereafter Pet.). Stripped of its rhetoric, the Lubow petition argues as follows:

1. The Bank is a federally chartered bank (Pet. 10)[1] and is required to keep certain records pursuant to the Bank Secrecy Act of 1970, 12 U.S.C. §§ 1829b, 1951-1959 (1975) and, as such, is in a "symbiotic relationship" (Pet. 10) with the federal government. Therefore, the disclosure of information by the Bank regarding Lubow was "the functional equivalent of the [sic] agency action by the Department of the Treasury . . ." (Pet. 15).
2. The Bank, as the "functional equivalent" of the Department of the Treasury, is subject to federal constitutional restraints regarding the disclosure of private information as well as statutory restraints provided for in the Privacy Act of 1974, 5 U.S.C. § 552a (1975) (Pet. 14).
3. Since the Bank as a government agency violated both Lubow's constitutional and statutory rights, a decision by this Court is necessary in order to develop "uniformity of decisions" (Pet. 19) and not allow state law to govern matters of disclosure of information regarding the customers of national banks which are "matters peculiarly of federal concern" (Pet. 19).

It is essential to this Court's certiorari jurisdiction that a federal question has been raised in a proper

[1] There is not, however, an iota of evidence in the record to indicate that the Bank has a federal charter.

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manner below. 28 U.S.C. § 1257(3). Rule 23.1(f) of this Court provides in pertinent part:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of the first instance and in the appellate court, at which, and the manner in which, the federal question sought to be reviewed was raised. . . .

Lubow's petition relates that in his brief to the Court of Appeals of Maryland, he "strongly asserted" the "private nature" of the information disclosed and, therefore, "in making his claims the petitioner *impliedly* raised a federal question in that the right to be protected from disclosure is controlled by federal law" (Pet. 8) (italics supplied).

The record herein does not disclose a single instance in which any federal constitutional or statutory right was invoked or claimed in either the trial court or in the Court of Appeals of Maryland. Lubow's petition contains the first references to the Bank Secrecy Act, the Privacy Act of 1974 or to any specific provision of the United States Constitution.[2]

Since Lubow never raised in the Maryland courts any issue of either the violation of his federal constitutional rights or his federal statutory rights, this Court is unable to exercise its certiorari jurisdiction. 28 U.S.C. § 1257(3).

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[2] In his 55-page brief to the Court of Appeals of Maryland, Lubow referred to his "constitutional right" to an expectation of privacy, without elaboration, on pages 14, 15 and 16. Neither the constitution in question nor any specific provisions were mentioned. Therefore, under decisions of this Court, no federal constitutional issue has been raised. Herndon v. Georgia, 295 U.S. 441, 442-443 (1935); *See* separate opinion of Mr. Justice White in Brady v. Maryland, 373 U.S. 83, 91 (1963).

Assuming *arguendo,* that Lubow had raised below the alleged deprivation of his federal constitutional or statutory rights, it is apparent that the "federal questions" he now raises are not substantial. First, it is beyond peradventure that the Bank is not, under applicable precedent, a governmental agency subject to either the restraints of the Bill of Rights or of statutes such as the Privacy Act of 1974. This Court has twice rejected the contention that banks, which keep records pursuant to the Bank Secrecy Act, are agents of the government. *United States v. Miller,* 44 U.S.L.W. 4528, 4530 (U.S. April 21, 1976). *California Bankers Ass'n v. Schultz,* 416 U.S. 21, 52-53 (1974).

That the Bank is required by the provisions of the Bank Secrecy Act to keep records (as are all banks) is of no moment. Just as a liquor license did not transform a private club into a state agency for purposes of the fourteenth amendment, *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972), and a state granted public utility monopoly did not transform a privately owned utility into a state agency, *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974), so too governmental record keeping and reporting requirements do not make the Bank a "functional equivalent" (Pet. 15) of the Department of the Treasury.

If Lubow's argument is availing, then virtually every corporation, banking or otherwise, which is involved in interstate commerce can be deemed a "functional equivalent" of some federal agency in that almost every corporation in the United States is required by law to make certain reports to the federal government. Lubow's argument proves too much as did the argument of the petitioner in *Jackson v. Metropolitan Edison Co., supra,* in which this Court observed that "[i]f the mere existence of this regulatory scheme made

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Metropolitan's action that of the State, then presumably the actions of a lone Philadelphia cab driver could also be fairly treated as those of the State of Pennsylvania." 419 U.S. at 350 n. 7 (1974).

Moreover, as this Court has recently noted in the criminal context, bank records, as here, are not subject to any "legitimate expectation of privacy". *United States v. Miller, supra,* 44 U.S.L.W. at 4530. Here, as noted by the Court of Appeals of Maryland, there is not even the certainity that Lubow's partnership interest was ascertained from bank records but, in fact, it is equally possible that it had been determined from "a lunch table conversation" unrelated to bank business (Pet. Appx. 6a).

Moreover, it is crystal clear that the information was not derived from records kept pursuant to the Bank Secrecy Act since this alleged invasion of privacy occurred in June of 1969 and the Bank Secrecy Act was not effective until June 30, 1972. *California Bankers Ass'n, supra,* 416 U.S. at 33. Moreover, even assuming that the Maryland National Bank is a "functional equivalent" of the Department of the Treasury, it is likewise true that there was no statutory violation of the Privacy Act of 1974 since the alleged invasion of privacy occurred five years before the effective date of that statute.

Lubow petitions for certiorari because of the necessity of "uniformity of decisions" to govern and protect customers of national banks. His petition cites no conflicting authority which "mandates" this uniformity of decision.

Since no federal question was ever raised below, this petition should be denied particularly since there is not even a colorable support for the assertion that the Bank

is a governmental agency and it is apparent that private parties are not subject to constitutional restrictions relating to privacy. *Katz v. United States,* 389 U.S. 347, 350-351 (1967). Moreover, even if the Bank is subject to federal constitutional and statutory restrictions like a federal agency, it is apparent that the respondents Hoffberger, Hollander and Rodowsky are not subject to such restraints.

CONCLUSION

This petition for writ of certiorari should be denied because (1) no federal question was ever raised below and (2) because the federal questions now raised are insubstantial.

Respectfully submitted,

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